No. 22779

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STATE OF ARIZONA, ex rel. EDGAR MERRILL, Sheriff of Apache County, Appellant, vs. WAYNE TURTLE, Appellee.	Appeal from the United States District Court for the District of Arizona

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

QUESTIONS PRESENTED

I. Whether the Governor of Arizona may interfere with the right of the Navajo Indians to exercise powers essential to tribal self-government by removing an Indian from the Reservation for purposes of extradition to another state.

II. Whether the Governor of Arizona may apply the state extradition process to a non-Navajo Indian residing on the Navajo Reservation without interfering with powers essential to tribal self-government, where the Tribe has

exercised powers of extradition over all Indians on the Reservation.

STATEMENT OF FACTS

The Appellee, a Cheyenne Indian who resides with his Navajo Indian wife on the Navajo Indian Reservation, is sought by the State of Oklahoma for trial on a charge of second degree forgery (R.I:9, I:23). After the Navajo Tribal government declined to extradite the Appellee to Oklahoma (R.I:4, I:7, I:13-15), demand was made upon the Governor of Arizona to secure the Appellee and the Governor issued his warrant of extradition (R.I:8-10). The Sheriff of Apache County thereupon arrested the Appellee on the Navajo Indian Reservation and confined him in the Navajo jail facility at Window Rock, Arizona, to await removal to Oklahoma (R.I:22, I:1-2). Before Oklahoma authorities arrived to transport him, Appellee sought a writ of habeas corpus on the ground that the State of Arizona had no jurisdiction to arrest and extradite him from the Navajo Indian Reservation (R.I:1-18). The district court, after hearing, ordered the issuance of the writ. (R.I:44).

On January 5, 1968, the Appellee was the subject of extradition proceedings on the same Oklahoma charge, under the law of the Navajo Tribe (R.I:7), which provides for a hearing before a Tribal judge upon demand to determine whether there is probable cause to believe the Appellee committed the alleged offense and whether he would receive a fair trial in the demanding State as prerequisites to rendition (R.I:15). The Tribal Court assumed jurisdiction of the Appellee, but after hearing before the Tribal Court, the Appellee was released on the ground that the Navajo Tribal law provided for extradition to three named states, Arizona, New Mexico or Utah and not to Oklahoma (R.I:7, I:5, I:49).

Upon being released by the Tribal Court Judge, the Appellee was arrested by an Arizona highway patrolman under the same

Oklahoma warrant and complaint and taken before the Arizona Justice of the Peace at Window Rock, Arizona. After hearing pursuant to the Arizona Uniform Criminal Extradition Act (A.R.S. §§ 13-1313, 13-1315), he was held to await issuance of the Governor's Extradition Warrant.

Apparently the Appellee was released on bail or recognizance by the Justice Court because sometime thereafter the Apache County Sheriff, or his agents, executed the Arizona Governor's February 6, 1968 extradition warrant by arresting the Appellee on the Navajo Indian Reservation at Window Rock and confining him in the Tribal jail facility at Window Rock (R.I:23-33). On February 16th, the Appellee was taken from the Tribal jail facility in Window Rock to the County jail at St. Johns, Arizona (R.I:23-33). On the 26th of February, the Apache County Sheriff returned him to the Reservation (R.I:34 and II:2-4) where he remained in the Sheriff's custody at Tribal jail facility during the proceedings below and until his release on the writ (R.II:2-3).

The district court entered no findings or opinion, but after extensive argument on the law, ordered the issuance of the writ of habeas corpus because he was ". . . satisfied that under the particular circumstances of this case, that the state authorities exceeded their jurisdiction in arresting the Petitioner [Appellee] on the Navajo Reservation." (R.II:28-29).

ARGUMENT ONE

THE GOVERNOR OF ARIZONA HAS NO AUTHORITY TO EXTRADITE THE APPELLEE FROM THE NAVAJO INDIAN RESERVATION BECAUSE:

A. *Under The Rule In* Williams v. Lee *The State Of Arizona Cannot Exercise Powers On The Navajo Reservation Which Are Essential To Tribal Self-Government.*

The United States Government recognized the right of the Navajo people to govern the affairs of Indians on the Navajo

Reservation in the Treaty of 1868, 15 Stat. 667 (12 Aug. 1868). The Supreme Court has, in a long line of cases beginning with *Cherokee Nation v. Georgia,* 5 Pet 1, 8 L. Ed. 25 (1831), consistently upheld the general principle that Indian tribes retain exclusive governmental power over the affairs of reservation Indians to the extent that Congress, in its plenary power over Indian affairs, has not acted explicitly to divest them of their sovereignty. *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 84 L. Ed. 894 (1940); *United States v. Kagama,* 118 U.S. 375, 30 L. Ed. 228 (1886); *Ex Parte Crow Dog,* 109 U.S. 556, 27 L. Ed. 1030 (1883); *See Worcester v. Georgia,* 6 Pet. 515, 8 L. Ed. 483, (1832). And *see* U.S. Department of Interior, FEDERAL INDIAN LAW, 398, 402 (1958). The principle of reservation self-government was reiterated in the landmark case of *Williams v. Lee,* 358 U.S. 217, 3 L. Ed. 2d 251 (1959). In *Williams* the Court held that the State of Arizona had no jurisdiction over a seller's action for the price arising out of a transaction between a white trader and an Indian on the Navajo Reservation because the exercise of such state jurisdiction, ". . . would undermine the authority of the Tribal Court over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 358 U.S. at 223, 3 L. Ed. 2d at 255. In *Littell v. Nakai,* 344 F.2d 486 (9th Cir. 1965), cert. denied, 382 U.S. 986, 15 L. Ed. 2d 474 (1965), this court applied the *Williams* test to sustain the lower court's dismissal of a suit to enjoin tortious interference with a contractual relationship between a lawyer and the Navajo Tribe for want of jurisdiction, holding, *inter alia,* that the exercise of diversity jurisdiction over the contractual relationship would interfere with reservation self-government. The *Williams* test is thus the modern formulation of the concept of treaty-protected retained sovereignty over reservation affairs. As the Court said in *Williams,* regarding the scope of Arizona's jurisdiction generally over the Navajo Reservation:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right

of reservation Indians to make their own laws and be ruled by them. 358 U.S. at 220, 3 L. Ed. 2d at 254.

In those cases where the Supreme Court has upheld the jurisdiction of the state over Indians, the court has always taken care to distinguish the particular fact situation from that of treaty-protected reservation self-government. *See, e.g., Organized Village of Kake v. Egan,* 369 U.S. 60, 7 L. Ed. 2d 573 (1962) and *Oklahoma Tax Commission v. United States,* 319 U.S. 598, 87 L. Ed. 1612 (1943), *and compare, Metakatla Indian Community v. Egan,* 369 U.S. 45, 7 L. Ed. 2d 562 (1962). The principle of retained tribal sovereignty has been held controlling in a variety of circumstances by those other federal circuits which have recently faced the problem of delineating exclusive tribal power, on the one hand, and federal or state power on the other. *e.g., Oliver v. Udall,* 306 F.2d 819 (D.S. Cir. 1962), cert. denied, 372 U.S. 908, 9 L. Ed. 2d 717 (1963) (Secretary of Interior's approval of tribal peyote law not violative of First Amendment because Tribal Council regulation of use of peyote in religious practices is exercise of self-government); *Native American Church v. Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959) (Tribal sovereignty is not limited by First Amendment restrictions absent Congressional action explicity extending the limitations to tribal governmental action); *Iron Crow v. Ogala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956) (upholding tribal criminal jurisdiction and power to tax as incidents of residual sovereignty). *See also Maryland Casualty Co. v. Citizens National Bank,* 361 F.2d 517 (5th Cir. 1966); *United States v. Forness,* 125 F.2d 928 (2nd Cir. 1942), cert. denied sub nom., *City of Salamanca v. United States* 316 U.S. 694, 86 L. Ed. 1764 (1942).

Congress has, in the exercise of its plenary powers over Indian affairs, authorized the states, to exercise limited functions on Indian Reservations, *e.g.,* 25 U.S.C. § 231 (authorizing state enforcement on reservations of state health and compulsory school attendance laws; the latter only with organized tribal government

consent); 25 U.S.C. § 223 (authorizing exercise by New York State of jurisdiction over civil action involving Indians), but explicit congressional action is required to divest the tribe of an essential feature of its exclusive control over internal affairs in favor of the state. *Williams v. Lee,* 358 U.S. at 220, 3 L. Ed. 2d at 254; *Iron Crow v. Ogala Sioux Tribe,* 231 F.2d 89, 94 (8th Cir. 1956). And Congress, in its most recent expression of policy on tribal-state relations, has emphasized the fundamental importance of maintaining tribal autonomy in the face of increasing state pressure to exercise control over internal reservation affairs by amending Public Law 280, Chapter 505 § 6, 67 Stat. 590 (1953), to require tribal consent to state assumption of criminal or civil jurisdiction over Indian Reservations. Civil Rights Act of 1968, Pub. L. 90-284 § 402 (a), (11 April 1968). This federal enactment, including the Indian Bill of Rights, is a continuation of the well-established federal policy of developing and strengthening the Navajo Tribal Government and its courts. *See,* The Navajo-Hopi Rehabilitation Act of 1950, 64 Stat. 46, 25 U.S.C. § 636 (1964), and the discussion in *Williams v. Lee,* 358 U.S. 217, 3 L. Ed. 2d 251.

Since *Williams,* the Secretary of Interior has approved the adoption by the Navajo Tribal Council of the Law and Order Code formulated by the Department of Interior. In *Oliver v. Udall,* 306 F.2d 819 (D. C. Cir. 1962), the court upheld the Secretary's action in approving the Tribal Council's action, stating:

> It is our view that the Secretary's approval of the tribal action in 1959 was entirely in keeping with that abstinence from federal intervention in the internal affairs of an Indian Tribe which the law clearly requires. The Secretary had simply recognized the valid governing authority of the Tribal Council. 306 F.2d at 823.

Thus, the federal courts, Congress and the Department of Interior have consistently recognized the right of the Navajo Tribal Government, its legislature and courts, to exercise ex-

clusive authority to adopt and enforce laws relating to internal reservation affairs and conduct. As this court said in *Littell v. Nakai:*

> In sum then, a strong congressional policy to vest the Navajo Tribal government with responsibility for their own affairs emerges from the decision in Williams. Plainly, fruition of the policy depends upon freedom from outside interference. 344 F.2d at 489.

Appellee has been unable to discover any explicit Congressional action limiting the exclusive power of the Navajo Tribal Government to extradite Indians found on the Reservation, nor has he been able to find any Congressional action granting the State of Arizona power to enter the Navajo Reservation and remove an Indian suspect on its own authority.

The question presented by the instant case, then, is whether the State of Arizona's exercise of extradition jurisdiction over the Appellee constitutes such interference as to undermine the authority of the Navajo Tribal Government over Reservation affairs and hence infringes the exclusive right of the Indians to govern themselves. *Williams v. Lee,* 358 U.S. 217, 3 L. Ed. 2d 251, *Littell v. Nakai,* 344 F.2d 486. The Appellant has argued that the United States Constitution Art. IV § 2 is dispositive of this case because it imposes a duty upon the governors of the various states to render up those who have fled from justice in sister states. Although this constitutional mandate is clear, it is equally clear that the imposition of this duty does not empower the Governor of the State of Arizona to go beyond the limits of his authority to take an individual to render him up to the authorities of the demanding state.

The Arizona Governor's duty to extradite can only be coextensive with his authority to do so. The application of the rule in *Williams v. Lee* to this case simply relieves the Governor of any duty to extradite Indians from the Navajo Reservation and places it exclusively within the Tribe's responsibility for self-gov-

ernment, because the scope of state power with respect to Indian Reservations is dependent in the first instance on the scope of retained tribal sovereignty over Indian affairs on the Reservation. *Williams v. Lee, supra; Littrell v. Nakai, supra.*

In *Colliflower v. Garland,* 342 F.2d 369 (9th Cir. 1965), this court held that a federal court had jurisdiction to issue a writ of habeas corpus to test the legality of the detention of an Indian pursuant to a tribal court order which violated potentially applicable provisions of the Bill of Rights. The court carefully distinguished the question there involved from the question of jurisdiction as between state and tribal courts, 342 F.2d at 376, 378, and expressly refused to rule on the relationship between tribal sovereignty and specific constitutional duties, 342 F.2d at 379. Further, the provisions of the Bill of Rights are restrictions on the acts of political entities in favor of individual rights; the extradition provision, on the other hand, operates to impose a duty on executives of distinct political entities assumed to possess the requisite authority to act. Therefore this court, in the instant case, must apply the principles of *Williams* and *Littell* to determine the proper allocation of authority between the Governor or Arizona and the Navajo Tribe with respect to extradition of Indians from the Reservation.

B. *The Power To Extradite Indians Found Within The Navajo Reservation Is Essential To Navajo Tribal Self-Government.*

The power to extradite a person to another jurisdiction for trial according to its criminal laws is clearly essential to any regime of self-government; indeed, it is established law that, in the context of interstate extradition, there is no power that can compel a state to perform its constitutional duty of extradition. *Kentucky v. Dennison,* 24 How. 66, 16 L. Ed. 717 (1861); 31 Am. Jur. 2d. *Extradition* § 47 (1967). The intimate relationship between exclusive extradition power and retained Navajo sovereignty over the reservation was recognized from the outset by the United

States Government in the Treaty of 1868, 15 Stat. 667 (12 August 1968). Article I of the Treaty provides in relevant part:

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo Tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. . . .

These provisions govern extradition of Indians from the Reservations; they or similar provisions are found in most treaties negotiated with the Indian Tribes. *See Ex Parte Crow Dog,* 109 U.S. 556, 569, 27 L. Ed. 1030, 1035 (1883). By their terms they recognize an exclusive jurisdiction in the Navajo Tribe to extradite Indians; thus a damage remedy is created as compensation for wrongful refusal to extradite. The Treaty, by explicitly including within tribal self-government the power of extradition, recognized the reality of tribal government needs in the context of white-Indian relations; a tribal government which lacked the power to determine when and under what conditions Indians would be rendered up to a foreign jurisdiction for trial would have little respect in the eyes of its Indian constituency.

The federal policy embodied in these Treaty provisions has continued through to the present. On January 27, 1956, the Navajo Tribal Council, the democratically elected Navajo legislature, passed a Resolution establishing procedures for Indian extradition. These procedures were approved by the Commissioner of Indian Affairs on January 31, 1956, and are set forth in 17 N.T.C. §§ 1841-42 (App. II). This extradition law, while it differs from the Uniform Criminal Extradition Act, provides complete procedures for extradition of Indians from the Navajo Reser-

vation. And in the very nature of the extradition process, either the State of Arizona or the Navajo Tribe has authority to extradite the Appellee, because as between the tribe and the State, the power cannot be concurrently exercised. Thus, if Arizona is permitted to exercise extradition power over Indians on the Reservation, it will preclude or disrupt the exercise of extradition power by the Navajo government.

Further, the power of extradition over Indians on the Reservation should be examined generally in the context of the Navajo Tribal Court's jurisdiction over criminal offenses by or against Indians committed on the reservation. From the outset of the relationship between the federal government and the reservation tribes, exclusive jurisdiction over Indian offenses on Reservations has always been assumed to reside in the tribal government until Congress explicitly removes it. *See Ex Parte Crow Dog,* 109 U.S. 556, 27 L. Ed. 1030 (1883); 18 U.S.C. §§ 1152-1153 (1964). Since 1959, the Navajo Tribal courts have administered a comprehensive penal code on the Reservation, punishing innumerable Indian offenders, as part and parcel of Tribal self-government. *See Oliver v. Udall,* 306 F.2d 819 (D.C. Cir. 1962). The jurisdiction of the Navajo Tribal Council to proscribe certain behavior as criminal, and the jurisdiction of the Navajo Tribal Courts to enforce the prescriptions of the Tribal Council, is of course limited to behavior within its territorial domain, but within that defined territory the tribal government functions to regulate the conduct of Indians generally as part of the an on-going community, except insofar as Congress has explicitly acted to vest jurisdiction in the federal courts. As discussed above, it has been the long-standing policy of the federal government to strengthen the capacity of the tribal government and courts to perform this critical function. If this tribal court system is to retain the respect of its citizenry which every court needs, if it is to function effectively as a regulator of social conduct, it is crucial that this court system be the vehicle through which criminal prosecution affects

the lives of Indians on the Reservation. The power to extradite is dependent on law, *Hyatt v. New York,* 188 U.S. 691, 47 L. Ed. 657 (1903); *Ex Parte Morgan,* 20 F. 299 (W.D. Ark. 1883), and courts generally are respected as neutral arbiters of the law as between the state and the citizen. For the reservation Indian it is important that his own court system be the arbiter of his liberty. If the Indians' right to govern themselves within the confines of the Navajo Reservation is to be meaningful, it is imperative that their own tribal government be the regulator of every significant aspect of their lives; the citizenry of the states expect no less, and for Indians the distinctiveness of their Reservation culture makes it even more important that the government which has the primary power to deprive them of their liberty is their own tribal government.

ARGUMENT TWO

THE PETITIONER WAS PROPERLY GRANTED A WRIT OF HABEAS CORPUS BECAUSE THE JURISDICTION OF THE NAVAJO TRIBAL GOVERNMENT OVER PERSONS ON THE RESERVATION EXTENDS TO ALL INDIANS ON THE RESERVATION.

The Navajo Tribal government undertakes to exercise jurisdiction over all Indians on the Reservation sought by a state or foreign jurisdiction. 7 N.T.C. § 63; 17 N.T.C. §§ 1841-1842. The precise question here is whether the Navajo Tribe's purported jurisdiction over the Appellee, who is a Cheyenne Indian resident of the Reservation is valid, and is exclusive of state jurisdiction.

The 1868 Treaty with the Navajos refers to "Indians" when describing virtually every undertaking by the two parties to the Treaty. *See* 15 Stat. 667 Arts. I, II, VI, & IX. Of particular importance is Article II which describes the territorial limits of the Reservation and also describes the people to reside thereon. The land is to be,

> ". . . set apart for the use and occupation of the Navajo Tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States to admit among them . . ." 15 Stat. 667 Art. II (12 August 1868).

The language indicates that the U. S. government contemplated at the outset that the population of the Reservation would include Indians of other tribes and that they would be treated in the same manner as Navajos. While the specific question whether the Navajo tribal authority included other Indians was not involved in *Williams v. Lee,* the court's description of the scope of tribal self-government based on the Treaty of 1868 is broad enough to include non-Navajo Indians and to exclude the state:

> Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in Worcester v. Georgia, was the understanding that the internal affairs of *the Indians* remained exclusively within the jurisdiction of *whatever tribal government existed.* 358 U.S. at 221-2 (emphasis supplied)
>
> * * *
>
> The cases in this Court have consistently guarded the authority of Indian governments over *their reservation.* 358 U.S. at 223. (emphasis supplied)

The approval of the Navajo extradition law by the Commissioner of Indian Affairs (R. I:48) is likewise phrased in terms of "Indians" and in no way is limited to Navajos. The Commissioner has authority over all Indians (25 U.S.C. § 2) and

> Some tribes have exercised [complete] jurisdiction, under express departmental authorization, over Indians of other tribes found on the reservation. This has been justified on the groud that the Department of the Interior may transfer the jurisdiction vested in the Courts of Indian Offenses to Tribal Courts, so far as concerns jurisdiction over members of recognized tribes. FEDERAL INDIAN LAW (1958 ed.) p. 450

Whether the terms of the Commissioner's approval was recognition of the inherent authority in the Navajo government over all

Indians on the Reservation or a delegation of authority is undetermined, but in either case it would appear that the Navajo extradiction law validly applies to all enrolled Indians of other tribes found on the Navajo Reservation.

Additionally, the application of the *Williams* test produces the same result. Indians are in many ways a group apart in the United States; because of government policy, and their own traditions, they have not been assimilated into the general population. As a result there appears to be a greater tie between the various Indian peoples than exists between the rest of American society. S. Steiner, *The New Indians,* 268 (1968). Social relations among members of different tribes are common for two reasons at least, the proximity of other Reservations such as the Hopi, Zuni, Jicarilla Apache and White Mountain Reservations, and the attendance of thousands of Indians of different tribes at Bureau of Indian Affairs off-reservation boarding schools. These factors combine to produce a significant number of inter-tribal marriages* like that of the Appellee. The orderly administration of reservation affairs including application of elaborate civil and criminal laws, depends upon jurisdiction over all Indian families residing therein.

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* The United States Census Office in Window Rock, Arizona is unable to give precise figures, but stated that there were many Navajos married to non-Navajo Indians living on the Reservation.

CONCLUSION

For the reasons stated above, this court should find that the exclusive power to extradite Indians from the Navajo Reservation is essential to tribal self-government and that the Governor of Arizona was without power to extradite appellee. Therefore, this court should affirm the order of the District Court ordering the issuance of a writ of habeas corpus releasing appellee from the custody of the Sheriff of Apache County, Arizona.

Respectfully submitted,

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APPENDIX

I

7 N.T.C. § 63

Jurisdiction—Generally

The trial Court of the Navajo Tribe shall have original jurisdiction over:

(a) Crimes. All violations of the Law and Order Code of the Navajo Tribe committed within its territorial jurisdiction by Indians.

(b) Civil Causes of Action. All civil actions in which the defendant is an Indian and is found within its territorial jurisdiction.

(c) Domestic Relations. All cases involving the domestic relations of Indians, such as divorce or adoption matters. Residence requirements in such cases shall remain as heretofore provided in regard to the Navajo Tribal Courts of Indian Offenses.

(d) Decedents' Estates. All cases involving the descent and distribution of deceased Indians' unrestricted property found within the territorial jurisdiction of the court.

(e) Miscellaneous. All other matters over which jurisdiction has been heretofore vested in the Navajo Tribal Courts of Indian Offenses, or which may hereafter be placed within the jurisdiction of the Trial Court by resolution of the Tribal Council.

II

17 N.T.C. § 1841. Indian Committing Crime Outside Indian country—apprehension on Reservation.

Whenever the Chairman of the Tribal Council is informed and believes that an Indian has committed a crime outside of Indian country in Arizona, New Mexico, or Utah and is present on the

Navajo Reservation using it as an asylum from prosecution by the state, the Chairman may order any Navajo policeman to apprehend such Indian and deliver him to the proper state authorities at the Reservation boundary.

17 N.T.C. § 1842.—Hearing; release

If any person being arrested as provided in section 1841 of this title so demands, he shall be taken by the arresting policeman to the nearest Court of the Navajo Tribe, where the judge shall hold a hearing, and if it appears that there is no probable cause to believe the Indian guilty of the crime with which he is charged off the Reservation, or if it appears that the Indian probably will not receive a fair trial in the state court, the judge shall order the Indian released from custody.

STATE OF ARIZONA)
) ss.
COUNTY OF APACHE)

THEODORE R. MITCHELL, being first duly sworn, upon oath deposes and says:

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

THEODORE R. MITCHELL

SUBSCRIBED AND SWORN to before me this 25th day of June, 1968.

GENEVIEVE DENETSONE
Notary Public

My Commission Expires:
March 7, 1969